

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

3. SIMMIK DRVIS,  
4. Petitioner  
5. VS  
6. JOHN TANACI (et al.),  
7. Respondents

CV-N-99-137-ECR(PHA)

Supplemental Points and Authorities

FILED

BB 8/20/99

Pursuant to the court's order dated Aug. 2, 1999  
which states that Petitioner will have 20 days  
to file supplemental points and authorities addressing  
whether he can overcome the procedural bar  
that is applicable to Ground Two (b-d). Petitioner  
now submits supplemental points and authorities.

Petitioner previously filed a motion concerning  
the dismissal of Ground 2. (b-d) but after he  
let a law clerk read it petitioner was told that  
the order was to dismiss ~~both~~ all two grounds.  
(Ground two and three.) Petitioner does not  
concede to the dismissal of this whole petition  
if this is so. Petitioner now submits a ~~valid~~  
effort to prove cause and prejudice attributable  
thereto based on the valid points of the record.

CAUSE FOR DEFAULTED  
CLAIM

The order states in part that petitioner  
must show that failure to consider his defaulted  
claims will result in a fundamental miscarriage of

1 Justice NARROWED, Rec'd, 489 U.S. 255, 262 (1989) or cause  
2 for the default and prejudice attributable there  
3 to. Specifically in order to overcome being  
4 procedurally barred from federal habeas review  
5 petitioners must explain why he failed to raise  
6 ground TWO b-d in his first post conviction petition  
7 for writ of habeas corpus.

8 IT was THROUGH NO FAULT OF PETITIONERS that the  
9 issues were not raised. Petitioner now submits  
10 exhibit A pg. 27. the supplement of petitioner's  
11 original petition dated March 6, 1981 which stats  
12 that appellant did TRY to raise the issues of ground  
13 2 d so petitioner will ~~ask~~ ask the court to  
14 dismiss ground 2 b-c but not ground 2 d. The  
15 respondent will argue that petitioner  
16 made this up so appellant has attached (1) The  
17 supplemental brief exhibit B page 28 through  
18 32 (2) the papers he received when he tried to  
19 file anything so he forwarded his supplement to  
20 his attorney of record page 17 (3) after  
21 numerous attempts to get attorney to file  
22 supplement petition wrote the bar and brought  
23 this to their attention on grievance file #  
24 91-101-11 pages 13 to 16 (letter stating  
25 she would not file supplement. Soon after  
26 petitioner was appointed new counsel  
27  
28

1 who also received the supplemental brief but did  
 2 [REDACTED]  
 3 NOT file it. Letter from new attorney page —  
 4 34 stating that he received the supplemental  
 5 brief dated March 6 1991. He instead supple-  
 6 mented his own and just used petitioners  
 7 affidavit page 37 to 40 (supplemental  
 8 affidavit filed and stamped Jan 9, 1992 still  
 9 before petitions original petition was heard)  
 10 which states in [REDACTED] Number 13 THAT The  
 11 court did not have jurisdiction to accept  
 12 guilty plea based on robbery allegations page  
 13 42 to 43. It is clear that petitioner state his  
 14 claims in his Supplemental Affidavit which was  
 15 filed in support of his original petition. And  
 16 along with all true and correct letters from the  
 17 bar, both attorneys, and his letters petitioner  
 18 tried hard to present his claim. An external  
 19 factor impeded efforts to comply with the state  
 20 procedural rules Murray v. U.S., 477 U.S. at 488.  
 21 and interference by state officials Buffalo Sun, N.Y.  
 22 854 F.2d 1158, 1163 (9th Cir 1988)

### Prejudice

23 AS stated in petitioners affidavit Number 14  
 24 page 39 Filed and stamped to original  
 25 supplement The court dismissed the robbery  
 26 information and agreed that it was a jurisdictional  
 27 error, furthermore the information used to  
 28

1 establish the degree of the crime violated the  
 2 due process clause. This worked to the actual  
 3 and substantial disadvantage infecting his entire  
 4 trial with error of constitutional dimensions  
 5 UNITED STATES v FRADY 456 U.S. 152, 170 (1982)  
 6 They should have held the charges ~~call~~ in  
 7 abeyance until the jurisdiction was resolved  
 8 and not wondered for two months if Petitioner  
 9 was really 16 even one saying why didn't petitioner  
 10 tell them he was 16 wanting to take responsibility  
 11 why he had been in adult JAIL for months  
 12 without anyone knowing. ~~the~~ Petitioner  
 13 had never been committed to any juvenile facility  
 14 so there was a chance even if slim that the juvenile  
 15 courts would have retained jurisdiction because  
 16 they could in accordance with the law at the  
 17 time petitioner ~~was sent~~ entered his plea see Exhibit C page 43  
 18 where the prosecutor states: after he  
 19 was held to answer I've had discussions with  
 20 his counsel and conducted some investigation  
 21 and I believe him to be 16. AND AS I  
 22 understand the law now although a person  
 23 of any age can originally be charged in  
 24 the adult courts with murder, for any other  
 25 crime even if it was committed during the  
 26 murderous transaction he has to be  
 27 charged originally in juvenile court. THE  
 28 charged originally in juvenile court.

1 court: he has to be certified. Exhibit C  
 2 page 43.

3 These errors so infected petitioners  
 4 plea that the resulting conviction violated  
 5 due process because after it was dismissed  
 6 and the court said it was jurisdictional ~~it~~  
 7 Exhibit C page 43. The robbery was  
 8 used to try and establish murder I "first  
 9 degree. The state prosecutor said that ~~it~~  
 10 ~~was~~ dismissal of Count II in robbery has  
 11 anything to do with the negotiations and is  
 12 not consideration Exhibit C page 43  
 13 but it was Exhibit D page 44  
 14 stating ~~it~~ by petitioners attorney AND the  
 15 other understanding is, Your Honor that the  
 16 STATE will not go down and try to certify  
 17 our client on the robbery and bring him  
 18 back, Exhibit D page 44.  
 19 These errors of constitutional dimensions  
 20 United STATES v. FRAZIER 456 U.S. 152, 178 (1982)  
 21 have violated petitioners due process rights.



22  
 23  
 24 The dismissal of the instant claim would result in  
 25 a fundamental miscarriage of justice. petitioner  
 26 was convicted of 1 degree Murder. The police  
 27 testified that Neway told the shooting was  
 28 accidental on second, the eye witness testified

1 THAT THE shooting was an accidental one  
 2 on record. Petitioner stated on record that  
 3 that ~~as~~ as he went to put the gun down  
 4 --- as I closed the trigger the gun  
 5 shot. Exhibit E page 47.  
 6 Petitioner has stated this from the onset  
 7 that the elements of the crime were not ~~told~~  
 8 told to him and since the court never obtained  
 9 proper jurisdiction once petitioner was held to  
 10 answer in adult court in accordance with  
 11 the law at the time petitioner was sentenced of  
 12 the conviction is faulty because jurisdiction  
 13 did attach once the robbery was charged, citing  
 14 U.S. v. FRAUDY 102 SCt at 1846; AT the outset,  
 15 we emphasize that this would be a different  
 16 case had FRAUDY brought before the District  
 17 Court affirmative evidence indicating that he  
 18 had been convicted wrongly of a crime of which  
 19 he was innocent. But FRAUDY IT MUST BE  
 20 remembered did not assert at TRIAL that  
 21 he and Richard Gordon beat THOMAS BENNETT  
 22 to death without malice. INSTEAD, FRAUDY  
 23 claimed he had nothing to do with the crime.  
 24 --- Since that time FRAUDY has never  
 25 presented colorable evidence even his own  
 26 Testimony, indicating such justification,  
 27 mitigation or excuse that would

1 Reduceen his crime from MURDER TO  
 2 MANSLAUGHTER. — IN THE CASE  
 3 Now before the court DAVIS (petitioner)  
 4 Has shown over welming on record  
 5 Evidence which proves he is not guilty  
 6 Of the 1st degree murder charge he stands  
 7 CONVICTED of. ~~Citing~~ Citing WINWRIGHT,  
 8 SYKES 978 L.2497 (1977) at 2502 "AN  
 9 IMPRISONMENT UNDER A JUDGMENT CAN NOT BE  
 10 UNLAWFUL, UNLESS THAT JUDGMENT BE AN  
 11 ABSOLUTE NULLITY; AND IT IS NOT A NULLITY IF  
 12 THE COURT HAS GENERAL JURISDICTION OF THE  
 13 SUBJECT, ALTHOUGH IT SHOULD BE ENROULED.  
 14 HENDERSON V KIBBE 431 U.S. at 154 97 S.Ct  
 15 + 1736 THE COURT HAS HELD THAT THE  
 16 DUE PROCESS CLAUSE PROTECTS THE  
 17 ACCUSED AGAINST CONVICTION EXCEPT  
 18 UPON PROOF BEYOND A REASONABLE DOUBT  
 19 OF EVERY FACT NECESSARY TO CONSTITUTE  
 20 THE CRIME WITH WHICH HE IS CHARGED.",  
 21 IN RE WINSHIP, SUPRA, 397 U.S. at 364,  
 22 905 Ct at 1073.  
 23  
 24  
 25  
 26  
 27  
 28

## Conclusion

For the reasons set forth above,  
Petitioner's petition  
should not be dismissed but the  
court should just dismiss ground  
2 and C and allow respondent to  
respond to the claims presented  
in petitioner's writ of habeas corpus.

JIMMIE DAVIS  
37362

P.O. BOX 607  
CARSON CITY  
NEVADA  
89702

CERTIFICATE  
OF  
MAILING

1 JIMMIE DAVIS SAYS:

2 ON THE 18 DAY OF AUGUST  
3 1999

4 I DEPOSITED IN THE NEVADA  
5 STATE PRISON MAIL ONE ORIGINAL  
6 and copies to the below listed  
7 addresses: Supplemental Points  
8 and authorities

9 CLERK U.S. DISTRICT COURT  
10 DISTRICT OF NEVADA  
11 400 SOUTH VIRGINIA ST. ROOM 301  
12 RENO NEVADA 89501

13 1030  
14 STATE OF NEVADA  
15 OFFICE OF ATTORNEY GENERAL  
16 555 E. WASHINGTON AVENUE, SUITE 3900  
17 LAS VEGAS NEVADA 89101

18 DATED this 18 DAY OF AUGUST 1999

19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
Jimmie Davis 22362  
Jimmie Davis 27362  
P.O. Box 667  
CARSON CITY NEVADA  
89702

CERTIFICATE  
OF  
MAILING

JIMMIE DAVIS SAYS:

ON THE 18 DAY OF AUGUST  
1999

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STATS PRISON MAIL ONE ORIGINAL  
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and authorities

CLERK U.S. DISTRICT COURT  
OF DISTRICT OF NEVADA  
400 SOUTH VIRGINIA ST. ROOM 301  
RENO NEVADA 89501

1030  
STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL  
555 E. WASHINGTON AVENUE, SUITE 3900  
LAS VEGAS NEVADA 89101

DIT TED this 18 day of AUGUST 1999

Jimmie DAVIS 22362  
JIMMIE DAVIS 27362  
P.O. BOX 607  
CARSON CITY NEVADA  
89701

*Lee Elizabeth McMahon*

Attorney at Law  
Granada Business Complex, Suite 9  
218 South Seventh  
Las Vegas, Nevada 89101

(702) 382-2741

January 22, 1990

File No. \_\_\_\_\_

Mr. Jimmie Davis  
Southern Nevada Correctional Center  
P.O. Box 208  
Indian Springs, Nevada 89018

Re: Petition for Post-Conviction Relief  
Case No. C85078

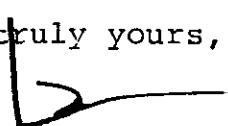
Dear Mr. Davis:

The Honorable Earle W. White, Jr. has appointed me as counsel for your Petition for Post-Conviction Relief.

I have a copy of your proper person petition and have requested a transcript of your plea entry, which I expect to receive within two weeks.

Judge White has set February 5, 1990 as a status check date. If I have the transcript by that date he will set a briefing schedule and that time.

Very truly yours,

  
LEE ELIZABETH McMAHON, ESQ.

LEM:pb

Copy

Anthony C. Green  
Inmate Law Clerk  
P.O. Box 208, SDCC  
Indian Springs, NV 89070

January 24, 1991

Lee Elizabeth McMahon, Esq.  
Granda Business Complex, Ste. 9  
216 South Seventh Street  
Las Vegas, Nevada 89101

Re: State v. Davis,  
Case No. C85078, Dept. IV

Dear Ms. McMahon:

I have been instructed to inform you that your client, Jimmie Davis, has been transferred from the Southern Desert Correctional Center, located at Indian Springs, to Ely State Prison, P.O. Box 1989, Ely, Nevada 89301 because of his sentence structure, i.e., life without possibility of parole.

Because I prepared Jimmie's Post-Conviction Petition, and have been monitoring the case since its filing, I cannot help but notice that had you prosecuted this Petition in a timely manner and been successful, Jimmie would still be here at Indian Springs; and not in the hardened, and possibly life-threatening, environment of the Ely State Prison.

In any event, I have also been instructed to ask that you take whatever action is necessary to have this matter submitted to the Court forthwith for its consideration. Should you fail to do this in what we might determine to be prompt, Jimmie's parents have been instructed to notify the judge of Department IV, the Nevada Supreme Court and the State Bar and inform them of the facts of the case and your lack of diligence in pursuing its prosecution and your failure to keep Jimmie properly informed, as mandated by SCR 152, 153 and 154, and seek their intervention.

Please direct any response to either myself or Jimmie directly at the addresses set forth above.

Sincerely

*Anthony C. Green*  
Anthony C. Green,  
Inmate Law Clerk

Jimmie Davis  
P. O. Box 1989  
Ely, NV 89301

Re: Case No. C85078 - State vs. Jimmie Davis

Rule 3.70. Papers which may not be filed.

Except as may be required by the provisions of NRS 34.730 to 34.830, inclusive, all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed, but must be forwarded to that attorney for such consideration as counsel deems appropriate. This rule does not apply to applications made pursuant to EDCR 7.40(b)(2)(iii).

**REASON FOR NEW RULE - To permit the clerk to forward to counsel all papers received from a defendant represented by an attorney.**

Your Motion for Briefing Schedule and Evidentiary Hearing date for Petitioner for Post Conviction Relief has been forwarded to your attorney, Lee McMahon, Esq.

*Aldine May*  
Deputy County Clerk  
4/23/91

# STATE BAR OF NEVADA

REPLY TO  RENO  LAS VEGAS

August 12, 1991

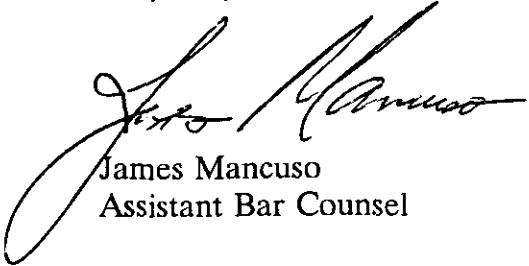
Mr. Jimmie Davis #27362  
P.O. Box 1989  
Ely, NV 89031

Re: Grievance File #91-101-11

Dear Mr. Davis:

Enclosed please find a copy of Lee Elizabeth McMahon, Esq.'s response to your letter of complaint. If you have any additional comments or clarifications please send them to this office in writing within the next ten (10) days. This matter will be presented to the next meeting of the screening panel of the Southern Nevada Disciplinary Board. You will be notified once the panel has reviewed the file and reached a disposition.

Very truly yours,



James Mancuso  
Assistant Bar Counsel

JM:jn

Enclosure

13

To State Bar of Nevada  
500 S. 3rd Street  
Las Vegas NV 89101

Dear State Bar of Nevada

I am writing you due to a serious matter that has developed since my counsel, Lee Elizabeth McMahon, Nevada Bar #001765 was appointed to my case to represent me in my pending petition for Post-Conviction Relief.

I request to bother you about this situation which has occurred, I have forwarded three letters to Mrs McMahon asking her to please inform me as to what she is preparing on my case. Copies of letters submitted here with. All of my letters have gone unanswered. Also I forwarded to her a supplemental petition requesting that she submit it before the court, no answer was sent to me whether she has filed it or not I have not heard from her in over a year while my Post Conviction is still pending in District Court IV.

I know this is not your problem, but I certainly need some guidance asking you please to contact ~~the~~ Mrs McMahon asking her to contact me in this matter so I will not have to further pursue a writ of Mandamus.

Because she refuses to accept my phone calls and replies to my letters this has become a serious matter and upon my transfer to Ely State Prison and further research on Mrs McMahon I have found she has a past history of having complaints filed against her for not serving other post conviction relief Patients.

I have written the Judge in the Eighth Judicial Court Dept IV presiding over my case in this matter, copy of letter submitted her with. May she would respond to the Nevada State Bar if you could take the time to find out why she does not respond to my inquiries of a status check on my case I would very much appreciate your assistance in this matter so I will not have to pursue any further legal action against her.

Respectfully Submitted  
Gimme Davis 27362  
Ely State Prison  
P.O. Box 1989  
Ely, Nev 89301

7  
Certificate of Service by Mail  
I Jimmie Davis do hereby solemnly  
swear, under the penalty of perjury, that  
I have served a true and correct copy of the  
foregoing letter to the State Bar of Nevada  
and my Attorney of Record Lee Elizabeth  
McMahon, Nevada Bar #001765 by placing  
it in the same in an envelope postage  
prepaid and placing it in the United  
States Mails from Ely State Prison  
on this day of 5-11-91 1981 addressed to

State Bar of Nevada  
500 S 3rd Street  
Las Vegas NV 89101  
and

Lee Elizabeth McMahon Esq  
Nevada Bar #001765  
216 South Seventh St. Suite 9  
Las Vegas, Nev 89101

Respectfully submitted  
Jimmie Davis  
Ely State Prison  
P.O.Box 1989  
Ely Nev 89301

per NR.5208165

March 6, 1991

To: Lee Elizabeth Mc Mahon,  
Attorney at Law  
216 South Seventh Street, Suite 9  
Las Vegas, Nevada 89101

Dear Counsel:

I have enclosed a copy of the  
supplemental petition for post-conviction relief and the points  
and authorities in support of the petition that I wish to have  
you file. Also, I request that you reschedule this case for a  
hearing after you file my supplemental petition. It has been  
almost thirteen months since I heard anything from you or the  
Court. After you file my supplemental petition please send me a  
filed stamped copy.

Sincerely,

Jimmie Davis #27362

Jimmie Davis,

## Ely State Prison

Post Office Box 1989

Ely, Nevada 89301

1 To the Honorable Judge Bonjouranni Dept IV  
2 Eighth Judicial District court  
3 200 S. Third street  
4 Las Vegas, Nevada 89155

5 RE: Appointed Counsel, Lee Elizabeth McMahon

6  
7 Dear Judge

8 I am writing you due to a serious matter  
9 that has developed since my counsel, Lee  
10 Elizabeth McMahon was appointed to my case  
11 to represent me in my pending petition for  
12 Post-Conviction relief.

13 Your Honor, I request to bother you about  
14 this situation, which occurred upon me once  
15 before that is my last counsel and now my  
16 present counsel's failure to keep me advised of  
17 my legal proceedings.

18 I have forwarded three letters to Mrs. McMahon  
19 asking her to please inform me as to what she  
20 is preparing on my behalf. All of my letters  
21 have gone unanswered, also, I forwarded to  
her a supplemental Petition requesting that  
she submit it before your Court. Evidently she  
has not.

22 Your Honor, I know this is not your problem  
23 but I certainly need some guidance on what to  
24 do on this very serious matter. Because she  
25 refuses to accept my phone calls and reply to  
26 my letters maybe she would listen to you  
27 If you could take the time to find out why  
28 she does not respond to my inquiries of a  
status check on my case, I would very  
much appreciate your assistance in this matter

1 Case No. C85078

2 Dept. No. IV

3

4

5

6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE  
7 STATE OF NEVADA IN AND FOR CLARK COUNTY

8 Jimmie Davis, )  
9 Petitioner, )  
10 v. )  
11 THE STATE OF NEVADA, )  
12 Respondent. )  
13

PETITION FOR  
POST-CONVICTION RELIEF  
(NRS 177.315 et seq.)

- 14 INSTRUCTIONS:
- 15 (1) This petition must be legibly handwritten or typewritten,  
signed by the petitioner and verified.
- 16 (2) Additional pages are not permitted except where noted or  
with respect to the facts which you rely upon to support your  
grounds for relief. No citation of authorities need be furnished.  
17 If briefs or arguments are submitted, they should be submitted in  
the form of a separate memorandum.
- 18 (3) If you want an attorney appointed, you must complete the  
Affidavit in Support of Request to Proceed in Forma Pauperis. You  
19 must have an authorized officer at the prison complete the certif-  
icate as to the amount of money and securities on deposit to your  
20 account in the institution.
- 21 (4) You must include all grounds or claims for relief which  
you may have regarding your conviction or sentence. Failure to  
raise all grounds in this petition may preclude you from filing  
22 future petitions challenging your conviction and sentence.
- 23 (5) You must allege specific facts supporting the claims in  
the petition you file seeking relief from any conviction or sen-  
tence. Failure to allege specific facts rather than just conclu-  
24 sions may cause your petition to be dismissed.
- 25 (6) When the petition is fully completed, the original and  
one copy must be filed with the clerk of the state district court  
for the county in which you were convicted within 1 year after the  
26 final judgment of conviction, or within 1 year after the final  
decision in your appeal if you appealed your conviction. One copy  
27 must be mailed to the dis- )  
were convicted or to the )  
in all particulars to th )  
of the county in which you  
tor. Copies must conform  
ted for filing.

1                   (7) Failure to follow these instructions may result in dis-  
2 missal of your petition. Failure to state clearly and precisely  
3 the grounds upon which you make your claim for relief, and to  
state clearly and precisely the facts and circumstances which give  
rise to your claim, may result in dismissal of your petition.

4                   PETITION

5                   1. Did you personally prepare your petition? If not, who  
6 did? Give name and, if a prisoner, his prison number: \_\_\_\_\_

7                   William McKinney, Inmate #13355, ELY State Prison

8                   2. Name and location of court which entered the judgment of  
9 conviction under attack: Eighth Judicial District Court

10                  In the County of Clark, Las Vegas, Nevada

11                  3. Date of judgment of conviction: December 12, 1988

12                  4. Length of sentence: Life Without Parole

13                  5. Nature of offense involved (all counts) First

14                  Degree Murder

15                  6. What was your plea? (check one):

16                  (a) Not guilty \_\_\_\_\_ (b) Guilty X (c) Nolo contendere \_\_\_\_\_

17                  If you entered a guilty plea to one count or indictment, and a not  
guilty plea to another count or indictment, or if the guilty plea  
18 was negotiated, give details:

19                  the negotiations was that the petitioner plead guilty to first  
degree murder without the use of a deadly weapon as a lesser

20                  included offense of count one and stipulate that the punishment  
be life without parole.

21                  7. Kind of trial (check one):

22                  (a) Jury \_\_\_\_\_ (b) Judge without a jury X

23                  8. Did you testify at the trial? Yes \_\_\_\_\_ No X

24                  9. Did you appeal from the judgment of conviction?

25                  Yes \_\_\_\_\_ No X

26                  . . . . .

27                  20

1       10. If you did appeal, answer the following:

2       (a) Name of court: \_\_\_\_\_ N/A

3       (b) Result: \_\_\_\_\_ N/A

4       (c) Date of result: \_\_\_\_\_ N/A

5       11. Other than a direct appeal from the judgment of conviction  
6       and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court,  
7       state or federal?

8       Yes X      No \_\_\_\_\_

9       12. If you answer to No. 11 was "yes," give the following  
10 information:

11       (a) (1) Name of court: Eighth Judicial District Court, Clark  
12       County, Nevada.

13       (2) Nature of proceeding: \_\_\_\_\_

14       Post-Conviction Relief

15       (3) Grounds raised: Plea was not knowingly and  
16       understandingly; Sentence was cruel and unusual punishment;  
17       Sentence violated the equal protection clause; Plea was entered  
18       without the effective assistance of counsel.

19       (4) Did you receive an evidentiary hearing on your petition,  
20 application or motion? Yes \_\_\_\_\_ No X

21       (5) Result: The case is still pending.

22       (6) Date of result: \_\_\_\_\_ N/A

23       (7) If known, citations of any written opinion or orders  
24       entered pursuant to such result: \_\_\_\_\_ N/A

25       (b) As to any second petition, application or motion give the  
26 same information:

27       (1) Name of court: \_\_\_\_\_ N/A

1 (2) Nature of proceeding: N/A

(3) Grounds raised: N/A

7 (4) Did you receive an evidentiary hearing on your petition,  
8 application or motion? Yes No N/A

9 (5) Result: N/A

(6) Date of result: **N/A**

11 (d) Did you appeal to the highest state court having juris-  
12 diction, the result of action taken on any petition, application  
13 or motion?

14 (1) First petition, application or motion? Yes No N/A

15 (2) Second petition, application or motion? Yes No ,

16 (3) Third petition, application or motion? Yes No

17       (e) If you did not appeal from the adverse action on any  
18 petition, application or motion, explain why you did not. (You  
19 must relate specific facts in response to this question. Your re-  
sponse may be included on paper which is 8 1/2 x 11 inches attached  
to the petition. Your response may not exceed five handwritten  
or typewritten pages in length.)

N/A

23           13. Has any ground being raised in this petition been pre-  
24 viously presented to this or any other court by way of petition  
for habeas corpus, motion or application? If so, identify:

26 (a) Which of the grounds is the same: None of the grounds  
27 raised herein were raised in the original petition for post-  
conviction relief.

(b) The proceedings in which these grounds were raised:

N/A

4        14. State concisely every ground on which you claim that you  
5        are being held unlawfully. Summarize briefly the facts supporting  
each ground. If necessary, you may attach pages stating additional  
grounds and facts supporting same.

(a) Ground one: COURT FAILED TO EXPLAIN THE ELEMENTS OF THE OFFENSE TO THE PETITIONER

Supporting FACTS (Tell your story briefly without citing cases or law.): The record is bare of the elements of first degree murder. See Guilty plea transcript attached hereto.

(b) Ground two: The petitioner was denied due process of law by use of robbery allegations to establish felony murder

Supporting FACTS (Tell your story briefly without citing cases or law.): At guilty plea transcript page 3 the prosecutor dismissed the robbery and told the Court that it was not considered. At (Guilty Plea trans. P. 7 and 8) he used robbery to establish murder in the first degree.

(c) Ground three: Court did not have jurisdiction  
to accept guilty based on robbery allegations.

Supporting FACTS (Tell your story briefly without citing cases or law.): At (guilty plea trans P.3) the Court dismissed the robbery information and agreed that it was jurisdictional error, but the State was allowed to use robbery allegation to establish first degree murder.

ESTABLISH THE DEGREE OF THE CRIME VIOLATED THE DUE PROCESS

CLAUSE  
Supporting FACTS (Tell your story briefly without citing cases or law.): (See Points and authorities attached hereto)

1  
2  
3       15. If any of the grounds listed above were not previously  
4 presented in any other court, state or federal, state briefly what  
5 grounds were not so presented, and give your reasons for not pre-  
6 presenting them. (You must relate specific facts in response to this  
7 question. Your response may be included on paper which is 8 1/2  
8 x 11 inches attached to the petition. Your response may not  
9 exceed five handwritten or typewritten pages in length.)

10                  N.R.S. 177.315 et seq allows for a supplemental petition and  
11                  authorities.

12       16. Do you have any petition or appeal now pending in any  
13       court, either state or federal, as to the judgment under attack?

14       Yes X       No \_\_\_\_\_

15       If "yes," state what court: Eighth Judicial district Court  
16                  Clark County.

17       17. Give the name and address if known of each attorney who  
18       represented you in the following stages of the judgment under  
19       attack herein:

20       (a) At preliminary hearing: David Gibson

21       (b) At arraignment and plea: David Gibson

22       (c) At trial: At the entry of guilty plea the petitioner was  
23                  represented by Stephen J. Dahl and David Gibson

24       (e) On appeal: N/A

25       (f) If any post-conviction proceeding:

26                  Lee Elizabeth Mc Mahon

1        18. Were you sentenced on more than one count of an indictment  
2        or information or on more than one indictment or information  
3        in the same court and at the same time?

4           Yes \_\_\_\_\_ No x

5        19. Do you have any further sentence to serve after you complete  
6        the sentence imposed by the judgment under attack?

7           Yes \_\_\_\_\_ No x

8        (a) If so, give name and location of court which imposed  
9        sentence to be served in the future: None

10      (b) Give date and length of sentence to be served in the  
11     future: N/A

12      (c) Have you filed, or do you contemplate filing any petition  
13     attacking the judgment which imposed the sentence to be served  
14     in the future?

15           Yes \_\_\_\_\_ No \_\_\_\_\_ N/A

16      20. If you are not filing the petition within 1 year after  
17     the final judgment of your conviction or of the final decision  
18     in your appeal, if any, state here good cause why not, and why the  
19     petition should be heard now. (You must relate specific facts in  
20     response to this question. Your response may be included on paper  
21     which is 8 1/2 by 11 inches attached to the petition. Your  
22     response may not exceed five handwritten or typewritten pages  
23     in length.) The original petition was filed within one year.

1 WHEREFORE, Petitioner prays that the court grant relief to  
which he may be entitled in this proceeding.

2 DATED this 6 day of March, 1991.

3  
4 Jimmie Davis  
5 Signature of petitioner  
6 Ely State Prison  
7 Post Office Box 1989  
8 Ely, Nevada 89301  
9 Address

10 STATE OF NEVADA )  
11 ) ss.  
12 County of White Pine)

13 VERIFICATION

14 Pursuant to NRS 15.010, under penalties of perjury, the under-  
15 signed declares that he is the petitioner, named in the foregoing  
16 petition and knows the contents thereof; that the pleading is true  
17 of his own knowledge, except as to those matters stated on infor-  
18 mation and belief, and that as to such matters he believes it  
19 to be true.

20 DATED this 6 day of March, 1991.

21 Jimmie Davis  
22 Signature of petitioner

23 Signature of petitioner's  
24 attorney (if any)

25 CERTIFICATE OF SERVICE BY MAIL

26 I, Jimmie Davis, hereby certify pursuant to  
27 N.R.C.P. 5(b), that on this 6 day of March, 1991,  
I mailed a true and correct copy of the foregoing PETITION FOR  
POST-CONVICTION RELIEF addressed to:

28 Rex Bell  
29 District Attorney  
30 200 South Third Street  
31 Las Vegas, Nevada 89155

32 Address

33 Jimmie Davis  
34 Signature of Petitioner

1 D I S T R I C T C O U R T  
2 CLARK COUNTY, NEVADA  
3  
4

5 Jimmie Davis,  
6 Petitioner,

7 vs.

Case No. C85078

8 Dept. No. IV

9 Docket No.       

10 The State of Nevada,

11 Respondent.  
12 \_\_\_\_\_ /

13 COVER SHEET FOR

14 SUPPLEMENTAL PETITION FOR

15 POST-CONVICTION RELIEF (N.R.S. 177.315 et seq.)

16 Date of Hearing: \_\_\_\_\_

17 Time of Hearing: \_\_\_\_\_

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EXHIBIT

A

27

1 D I S T R I C T C O U R T  
2 CLARK COUNTY, NEVADA  
3  
4

5 Jimmie Davis,  
6 Petitioner,  
7 vs. Case No. C85078  
8 Dept. No. IV  
9 Docket No.         
10 The State of Nevada,  
11 Respondent.

12 \_\_\_\_\_  
13 POINTS AND AUTHORITIES IN SUPPORT OF  
14 SUPPLEMENTAL PETITION FOR  
15 POST-CONVICTION RELIEF (N.R.S. 177.315 et seq.)

16 Date of Hearing: \_\_\_\_\_  
17 Time of Hearing: \_\_\_\_\_  
18  
19 I

20 ARGUMENT  
21

22 The record is bare of the elements of first degree  
23 murder, neither is there anything in the record showing that  
24 the Court explained the Elements of first degree murder to the  
25 petitioner before accepting his guilty plea. The petitioner  
26 argues that intent to cause death was an element of the crime  
27

28 EXHIBIT  
B-28 28

1 of murder in the first degree. However, the state argued at the  
2 guilty plea hearing indirectly that intent to cause death was  
3 not an element of the offense because the petitioner's intent  
4 was established when he pointed the victim's gun at her and  
5 told her to leave without her gun. The state's argument was in  
6 violation of the plea negotiations and could not be used to  
7 establish felony-murder. Therefore, the Court had a duty to  
8 explain to the defendant, on the record, the elements of first  
9 degree murder. Besides, the Court would have still had the same  
10 duty to explain the felony-murder rule to the defendant if its  
11 application had been correct. See, HENDERSON v. MORGAN, 426  
12 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). Also, the  
13 defendant never made any factual allegations that would  
14 constitute murder in the first degree. See HANLEY v. STATE, 624  
15 P.2d 1387 (1981). The plea should be set aside and the  
16 petitioner should be allowed to plead anew.

17  
18 II

19 ARGUMENT

20  
21 The petitioner argues that he was denied due process of  
22 law on the grounds that the robbery and its allegations were  
23 dismissed before he entered his guilty plea, but at page 7 and  
24 8 of the guilty plea transcript the prosecutor used the robbery  
25 allegation to establish "Felony Murder". The petitioner argues  
26 that this was in violation of article 1, section 8, of the  
27  
28

1 Nevada Constitution. His attorneys failed to object, but the  
2 error is one that violates the petitioner's State and Federal  
3 Constitutional rights.

4

5 III

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ARGUMENT

7

8 The petitioner argues that the Court did not have  
9 jurisdiction to hear the robbery allegation or anything  
10 pertaining thereto since those charges were dismissed and the  
11 state promised that they would not be for consideration to the  
12 plea for murder in the first degree. Even though the attorneys  
13 for the petitioner failed to object, the fourteenth amendment  
14 of the constitution of the United States does not allow a  
15 juvenile confronted with charges as serious as first degree  
16 murder to be left to rely on inadequate counsel for his defense  
17 even in a guilty plea hearing.

18

19 IV

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ARGUMENT

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22 In all guilty plea hearings the Court has the duty to  
23 determine the degree of the crime that the accused is charged  
24 with after it accepts a guilty plea. In the case at bar the  
25 petitioner was interrupted by the prosecutor while trying to  
26 convey to the court the necessary facts of the crime. See

27

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1 guilty plea transcript page 7. Actually, the Court never did  
2 hear enough from the petitioner on October 12th 1988 to  
3 determine that the degree of murder was in the first degree.  
4 See SHERIFF v. CLARK COUNTY v. LIGMAN, 697 P.2d 107 (1985);  
5 RAMOS v. STATE, 58 Nev. 446, 83 P.2d 147, (1938). If the Court  
6 had determined degree of the crime in this case it would have  
7 found an abundance of evidence that showed that the defendant,  
8 if but for his attorneys failure to defend him, could have not  
9 been convicted of any of the degrees of murder. Involuntary  
10 manslaughter may have been out of the adult Court's  
11 jurisdiction? Consequently, the attorneys failed to save the  
12 Court from mistake by requesting that the Court hear the  
13 defendant's story in full then determine the degree of his  
14 guilt. See for example: HARRIS v. STATE, 76 Tex.Cr.R. 126, 131,  
15 172 S.W. 975, 977 (1915).

16

V

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ARGUMENT

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19  
20 The record shows that the prosecutor told the Court,  
21 after moving that the robbery and its information be dismissed,  
22 that the robbery was in no way had anything to do with the  
23 negotiations and that it would not be considered. See page 3 of  
24 the guilty plea transcript. However, the prosecutor turned  
25 right around and used the petitioner's out of Court statement  
26 to "state for him" the facts of the crime. Twice he stated that  
27

28

1 the petitioner told the victim to "get out". He told the Court  
2 that the petitioner's intent arose from his intent to keep the  
3 weapon. See guilty plea transcript page 8. It is clear that the  
4 prosecutor is using the information from the already dismissed  
5 count of robbery to establish murder in the first degree. The  
6 prosecutor must not be allowed to use an out of Court statement  
7 made by the petitioner at a time when he was under extreme  
8 duress; besides, the statement was never considered by the  
9 Court for its voluntariness. See, SANTOBELLO v. NEW YORK, 404  
10 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The petitioner  
11 was never asked did he commit the crime intentionally. He made  
12 no factual allegations to the Court that would have constituted  
13 elements of the offense for first degree murder. HANLEY SUPRA.  
14 Therefore, the plea should be set aside.

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1                           CONCLUSION  
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HERE, the petitioner has set forth good cause for setting aside his plea, and this Court should so find that the plea is constitutionally infirm.

6                           WHEREFORE,  
7  
8

The petitioner prays that his plea of guilty be set aside and that he be allowed to plead anew.

9                           For whatever other relief that this Court deems just and appropriate.  
10

11                          DATED this 6 day of March, 1991  
12  
13

Respectfully Submitted

14                          Jimmie Davis #27362  
15  
16                          Jimmie Davis,

17  
18  
19  
20                          Lee Elizabeth Mc Mahon,  
21                          Attorney for petitioner.  
22  
23  
24  
25  
26  
27  
28

Law Offices of  
*Cherry & Bailus*

501 SOUTH SIXTH STREET  
LAS VEGAS, NEVADA 89101

TELEPHONE  
(702) 385-3788

FACSIMILE  
(702) 385-5125

MICHAEL A. CHERRY, ESQ.  
MARK B. BAILUS, ESQ.  
CATHERINE ANN WOOLF, ESQ.

DOLORES M. LAVERTY  
GAIL A. GRISWOLD  
LEGAL ASSISTANTS

July 26, 1991

Mr. Jimmie Davis  
Ely State Prison  
Post Office Box 1989  
Ely, Nevada 89301

Re: Jimmie Davis v. State of Nevada

Dear Mr. Davis:

Please be advised that on July 22, 1991 the undersigned was appointed to represent you regarding your Post-Conviction Relief. I have been in contact with Ms. Lee McMahon and have obtained portions of her file relating to the original Petition for Post-Conviction Relief filed in 1989, as well as your most recent Petition dated March 6, 1991. She also provided me with letters she received from Mr. Anthony C. Green regarding your case. I am also in receipt of a copy of Reporter's Transcript of Plea heard on October 12, 1988.

As I am only in receipt of these documents just today, I obviously have not had the time to digest their contents. I will begin preparation of the Supplemental Points and Authorities of your Post-Conviction Relief and will advise as to when this matter has been set for evidentiary hearing.

Should you have any questions regarding this matter, or should you wish to discuss this further with me, please feel free to contact my office by calling collect.

Sincerely,

*Mark B. Bailus* /  
MARK B. BAILUS, ESQ.

MBB/ps

304

August 7, 1991

To: MARK B. BAILLUS ESQ  
501 SOUTH SIXTH STREET  
LAS VEGAS NEVADA  
89101

Dear Sir:

In my supplemental petition I argued that the court did not have jurisdiction to hear the robbery case for the purpose of establishing the degree of the homicide. In actuality I was a juvenile when the offense was committed, consequently, the adult court did not have jurisdiction over me on the robbery charge. I had a right, I believe, to be tried in juvenile court on the robbery charge before entering a plea in adult court. However, See In Re Famey, 583 P.2d 1210 (1978); Jessie v. Superior Court of San Mateo County, 576 P.2d 963, 145 Cal.Rptr. 1, 20 C.3d 893, vacated California v. Jessie West, 99 S.Ct. 304 (1978); Garrison v. Jennings, 529 P.2d 536 (1974); State v. Watson, 586 P.2d 1253, 120 Ariz. 441 Cert. Den. 99 S.Ct. 1254 (1978). I believe that the Juvenile Court would maintain jurisdiction over the robbery charge until an appeal was taken from its decision and judgment; therefore, since I was a juvenile I had a right to be tried in Juvenile Court on the robbery charge if the state was going to use it as an underlying felony to establish felony-murder?

Please let me know if the above issue have merit. I never intended to shoot or kill the victim. I tried to convey that to the court at my entry of guilty plea hearing but I was interrupted by the prosecutor. I was joking with the victim and when I tried to lower the gun to and uncock it the hammer slipped and she got shot. I never told the court that I intended to kill the victim. If I find any more case law in support of my issues I will send them to you.

Sincerely,

Jimmie Davis  
Jimmie Davis, Inmate # 27362  
Ely State Prison  
Post Office Box 1989  
Ely, Nevada 89301

FILED

1 DISTRICT COURT JAH 9 3 28 PM '96

2 CLARK COUNTY, NEVADA

3 JIMMIE DAVIS,

CLERK

4 Petitioner,

Case No: C-85078

5 vs.

Dept No: IV

6 THE STATE OF NEVADA

Docket No: "C"

7 Respondent,

===== /

9 Date of Hearing \_\_\_\_\_

10 Time of Hearing \_\_\_\_\_

11 AFFIDAVIT IN SUPPORT OF

12 PETITION FOR POST-CONVICTION RELIEF

13 STATE OF NEVADA )

14 ) ss:

15 COUNTY OF WHITE PINE )

16 I, JIMMIE DAVIS, do hearby swear under penalty of perjury  
17 that the assertions of this affidavit are true.

18 1. That I Jimmie Davis am the Petitioner in the above-  
19 entitled action and make this affidavit in support of my  
20 Petition for Post-Conviction Relief.

21 2. That Petitioner is competent to testify and therefor  
22 would be able to testify if called upon to do so and have  
23 personal knowledge to the truth of the facts herein set out,  
except to those matters stated on information and belief,  
and as to such matters he believes the same to be true.

26 3. That Petitioner is entitled to relief sought.  
27 4. That Petitioner makes this affidavit in good faith.  
28 5. That Petitioner was denied Due Process of Law.

1       6. That Petitioner was denied the effective assistances  
2 of counsel during plea negotiation's and plea hearing. Counsel  
3 never explained to Petitioner the elements of the crime charged  
4 when case law clearly states that in order for a guilty plea  
5 to be accepted the defendant must know the elements of the  
6 crime to which he plea's.

7       7. That Petitioner was denied effective assistances of  
8 counsel when counsel failed to explain what "MALICE AFORETHOUGHT"  
9 meant, and that by pleading guilty Petitioner was admitting  
10 that he intentionally killed the victim despite Petitioners  
11 unwavering claim that the shooting was accidental.

12       8. That appellate counsel failed to persue or investigate  
13 after being told by an eye witness that they would testify  
14 to the fact that the shooting was indeed an accidental shooting.  
15 Yet counsel still had a sixteen (16) year old plea guilty to  
16 First Degree Murder and agree to Life in prison without the  
17 possiblity of parole, knowing the Petitioner was illiterate  
18 to the criminal justice system. Whitness being Arthur Cullins.

19       9. That Petitioners plea of guilt was not knowing and  
20 intelligently or understandingly entered when the Courts failed  
21 to canvass the Petitioner properly in open court, assuring  
22 that he understood each and every element of the crime  
23 before a plea of guilty could be accepted by the Court.

24       10. That Petitioner was seriously prejudiced as a result  
25 of counsel's errors, omissions and counsel's failure to  
investigate or interview witnesses and research applicable  
law which would negate a First Degree Murder charge based upon  
the factual circumstances surronding the case at bar, thus

1       denying Petitioner his Sixth Amendment Right to resonable  
2       effective assistance of counsel.

3           11. That the records of the Plea Hearing are bare of the  
4       elements of First Degree Murder therefor the Courts should  
5       not have accepted the Petitioners guilty plea whereas no factual  
6       statement to the Courts were made which would constitute an  
7       admission to the elements of the offense charged.

8           12. That in prosecution of murder where defendant pleads  
9       guilty, statue requires that Trial Court first determine  
10      degree of guilt and then fix punishment upon theory that no  
11      issue is left to guilt of crime of murder, Petitioner Clearly  
12      demonstrates that the Due Process in this claim was not carried  
13      out therefore denying him of this right.

14           13. That Petitioner was denied Due Process of Law by use  
15      of robbery allegation to establish felony murder. At the plea  
16      hearing, the prosecutor dismissed the robbery charges and told  
17      the Courts that it was not considered, than used robbery to  
18      establish murder in the first degree. The Court did not have  
19      jurisdiction to accept guilty plea based on robbery allegations.

20           14. That the Court dismissed the robbery information  
21      and agreed that it was jurisdictional error, futhermore the  
22      information used to establish the degree of the crime violated  
23      the Due Process Clause.

24           15. That Petitioner was denied Due Process of Law when  
25      the police failed to notify his parents or attorney before the  
26      Petitioners interrogation, arrest or indictment,whereas a minor  
27      is entitled to the presence of his parents or attorney before  
28      he is charged with a crime as an adult.